Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/04508/2015

THE IMMIGRATION ACTS

Heard at: Field House	**Determination Promulgated**
On: 26 April 2017	**On: 10 May 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE CHANA

Between

THE SECETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

MR ABIODOUN SULAIMON
(NO ANONYMITY DIRECTIONS MADE)

Respondent

Representation:

For the Appellant: Mr P Singh of Counsel
For the Respondent: Mr D Coleman, Senior Presenting Officer

DECISION AND REASONS

1. The appellant in this appeal is the Secretary of State for the Home Department.
The appellant is a citizen of Nigeria born on 17 August 1977. For the sake of convenience, I shall continue to refer to the parties as they were referred to before the First--tier Tribunal.

2. First-tier Tribunal Judge allowed the appellant's and his wife and three children's appeals pursuant to Article 8 of the European Convention on Human Rights against the decision of the respondent made on 6 August

2015 refusing his application for leave to remain on human rights grounds.

3. Permission to appeal to the respondent was granted by First-tier Tribunal Judge JG McDonald on 9 November 2016. Upper Tribunal Dr HH Storey in a decision dated 10 January 2016 found that there was a material error of law in the decision of the First-tier Tribunal and set it aside. He adjourned the case and retained it in the Upper Tribunal for hearing and stated that further fact-finding necessary in the appeal is of limited scope.

4. Upper Tribunal Judge Storey said that it is clear from the case of ***MA Pakistan [2016] EWCA Civ 705***, that the fact that there is a qualified child is a relevant consideration and one that might be said to point to it being in his interest to remain in the United Kingdom, but it is equally clear that the assessment of reasonableness must take account of the conduct of the claimant and his wife and said that such an assessment has yet to be made.

5. Judge Storey stated that to be adequate legally and factually, a proper assessment of the best interests of the child must be based on a careful consideration of the likely circumstances of the claimant and family, if returned as a unit to Nigeria. He further stated that an objective evaluation needs to be made on the question of whether the claimant and his wife would be able to get a job in Nigeria, both of whom had previously worked in that country. Judge Storey stated that so far as concerns the evidence of the claimant, his wife and her sister regarding their circumstances in the United Kingdom, however he saw no reason for why the Judge's positive findings regarding that should not be preserved.

6. Thus, the appeal came before me.

First-tier Tribunal's Findings.

7. The respondent allowed the appellant's application to remain in the United Kingdom outside the Immigration Rules on the bases of his and his children's private life in the United Kingdom.

8. The First-tier Tribunal allowed the appellant's appeal, concluding that

> [58]. Section 117B of the Act confirms that the maintenance of effective immigration control is in the public interest, and that it is also in the public interest that persons who seek to enter or remain in the United Kingdom are financially independent. Furthermore, little weight should be given to a private life of a person which was established when that person was in the United Kingdom unlawfully.

The hearing

9. At the hearing, there was no oral evidence and I heard submissions by both parties. On behalf of the respondent, Mr Singh relied on the rule 25 notice of 6 August 2015. He submitted that it was not accepted that the appellant came to this country in 1995 because he is not able to succeed under the long residence rules of the Immigration Rules. The appellants have been in this country unlawfully. He accepted that there are now two qualifying children because the second child is now seven years old, the older child is eight years old and the youngest child is three years old. It was submitted that the children are not at a critical stage of their education and have no health problems. Even if the children do not speak the language Yourba, they can learn it with the help of their parents but in any event English is the spoken language in Nigeria. He submitted that even if the children have been in this country for seven years, significant weight should be given to that fact but that is not where the story ends. Even if it is in the best interests of the children to remain in the United Kingdom, it is not considered unreasonable for them to leave with their parents who have had no lawful status in this country. I should apply the test of reasonableness. I should consider the wider public interest and the parents' immigration history. The elements in paragraph 116 are not restrictive and therefore it must be taken into account that the appellant and the children if they are allowed to live in this country, will have recourse to public fund such as the NHS and schooling.

10. He further submitted that the children are very young and referred me to the case of ***Azmi Moyed and others [2013] UKUT*** where it is stated that the children's connections the United Kingdom become more important from ages of 4 to 11. The fact that the appellant claims that he does not have contacts in Nigeria, does not mean he will be unable to obtain employment in Nigeria. The appellant cannot equate employment with not having contacts in Nigeria. The parents have worked in Nigeria in the past and therefore they can get jobs on their return. They can establish their social economic network on their return Nigeria. There is no evidence that the mosque community will not continue to support the appellant in Nigeria given that the cost of living in Nigeria is less than the support they give the appellant's family in the United Kingdom.

11. Mr Coleman on behalf of the appellant's stated that there are now two qualifying children and the case becomes stronger. He submitted that the worst that can be said about the parents is that there are over stayers but asked me to consider that there are no aggravating factors in their immigration history. He submitted that factual basis of this case has been preserved by Judge Storey in his decision on finding an error of law.

12. He stated that the eldest child is nearly a British citizen because he has been here for nine years and would be entitled to citizenship at the age of 10. The appellants have developed no skills in the United Kingdom that they can take back to Nigeria to enable them to find jobs as they have not worked in the United Kingdom. This is relevant for the children because their parents will not have any financial support and the appellant's wife has no family. The appellant worked as a domestic worker and his wife worked as a kitchen assistant in a hospital in Nigeria. English is the language of the household. The older child is in primary school and has good attendance and academic achievements. The knowledge of Yourba of the children is very weak. The appellant sister's evidence was that the appellant has nothing to go back to in Nigeria. The elder children are inducted into the education system and have no ties in Nigeria. There will be significant disruption to education and social development for the children. They have cousins in this country who they have grown up together and have family life with them. Therefore, reasonableness of removal has to be assessed against all these factors taken together.

13. I was referred to case law two support the appellant's case. It was emphasised that the children are born in this country as opposed to those who are born elsewhere and come to this country. He considers this to be a significant factor to be taken into account in favour of the children of the appellant. Children born in this country are in a better position because they have no connection with any other country.

Assessment under Article 8

14. An error of law has been established in the decision of the First-tier Tribunal and it has been set aside. I have heard evidence and submissions to enable me to remake the decision in respect of Article 8 of the European Convention on Human Rights.

15. The evidence of the appellant and his wife was found by the First-tier Tribunal to be largely credible and it was accepted that the appellant and his wife live together with their three children as a close family unit. It is accepted that both the eldest children of the appellant are integrated into the education system in the United Kingdom and progressing well with their educational development as evidenced by their school reports. There are now two qualifying children the eldest child is 9 years of age and the second child is now aged 7 in the youngest child is three years of age.

16. Given that Judge Storey preserved the findings of the First-tier Tribunal Judge in respect of the evidence of the witnesses who gave evidence before the First-tier Tribunal. The evidence which is accepted is that the

appellant does not have any family in Nigeria. The appellant's sister-in-law stated in her evidence before the First-tier Tribunal that her family and that of the appellant help each other financially but would not be able to send any financial support to the appellant's family if they were returned to Nigeria.

17. There was no dispute that the appellant does not meet the requirements of the Immigration Rules. The appellant's application was made pursuant to Article 8 of the European convention on Human Rights in respect of him and his three children's private life in the United Kingdom.

18. I have considered Lord Bingham's step by step approach in the case of ***Razgar, R (on the Application of) v SSHD [2004] UKHL 27*** and in so doing recognised that at all stages of the Article 8 assessment when deciding whether there is a family or private life, when deciding whether any existing family or private life is the subject of an interference having grave consequences and when deciding whether any such interference is proportionate to the legitimate public end sought to be achieved, the approach is to take into account a wide range of circumstances including the appellant's previous family and personal circumstances and the likely developments in the future.

19. It is not in dispute that the appellant has not lived in this country lawfully and his immigration status as always been precarious. Having said that I cannot consider the children's parents adverse immigration history when I consider the children's best interests which are my primary responsibility but in line with the case of ***MA Pakistan [2016] EWCA Civ 705***, it is equally clear that the assessment of reasonableness must take account of the conduct of the claimant and his wife and said that such an assessment has yet to be made. The appellant and his wife have always been in this country unlawfully. They had three children in this country when they were here unlawfully. They now rely on these children's private life to continue to live with them in this country.

20. I take into account that the children are not British citizens and are not entitled to rely on the public purse and receive the special treatment and care on social services of this country. It is clearly stated in ***EV Philippines [2014] E WCA 7874*** that if the parents are removed, then it is entirely reasonable to expect the children to go with them. Because the best interests of children are to remain with their parents. In ***EV Philippines,*** it was stated that **"**although it is of course a question of fact for the Tribunal, I cannot see the desirability of being educated at the public expense in the UK can outweigh the benefits to the children of remaining with their parents. Just as we cannot provide medical treatment for the world, so we cannot educate the world".

21. The appellant does not meet the requirements of the Immigration Rules and I must consider whether there are any exceptional circumstances where the appellant and his family should succeed under Article 8 when they are not able to succeed under the Immigration Rules which are by and large Article 8 compliant.

22. I find that two of the children are qualified children who are aged seven and nine and I accept that the nine-year-old would be entitled to British citizenship at the age of 10 as submitted by the appellant.

23. The evidence is that the appellant's parents when they lived in Nigeria were on low income jobs. The appellant's wife was working as a kitchen assistant and the appellant worked as a domestic worker. The evidence of the appellant is that he and his wife have not worked in the United Kingdom and have relied on support from their family and the mosque and therefore have not acquired further skills to find jobs in Nigeria.

24. In light of the case of ***EV Philippines***, I ask the material question which is – is it in the best interests of the child to remain in this country or to be removed with their parents to Nigeria. This balancing exercise is central with the consideration for the need to maintain immigration control. I accept that the welfare and the best interests of the children must be that they can be looked after on their return to Nigeria by their parents in light of the evidence that they have no family network or contacts in Nigeria to help them settle down into the country. I have considered the observations in ***Zoumbas [2013] UK C70*** that the best interests of the child must be a primary consideration but considered that it does not have the status of paramount consideration.

25. I consider the case law including ***Azmi-Moyed*** and it was required that the Judge to find whether it would be reasonable for a child who has lived in the United Kingdom for seven years to leave the country. The case also states that the children's connections the United Kingdom become more important from ages of 4 to 11. The qualifying children are aged nine and seven.

26. As the starting point in my assessment, I find that the best interests of the children lie with living with their parents wherever they live. The appellant's parents have no immigration status in this country and have lived here unlawfully and therefore will be returned to Nigeria unless I find that it is in their children's best interests for them to live in this country because their children's best interests require it.

27. I have given careful consideration of the likely circumstances of the appellant's children if returned as a family unit to Nigeria. I have taken into account all the factors relevant to their well-being if returned to Nigeria. I do not accept that contacts are necessary in Nigeria to enable

the appellant and his wife to be employed in Nigeria. They were working in Nigeria before they came to the United Kingdom. They claim not to have worked in this country and have lived on the support of others for over a decade which is not particularly credible but for the purposes of this decision, I accept that they have not worked in this country.

28. Even if the appellant and his wife have not worked in this country, no credible reason has been given for why they cannot get jobs in Nigeria given that they worked in that country before they came to the United Kingdom. I accept that the jobs in Nigeria may not be as highly paid as jobs in this country, but the standard of life is not as expensive as in this country. This means that the appellant and his wife can look for jobs on their return and to look after their children. The evidence is that the appellant has been supported by his family and the mosque for over a decade, therefore there is no reason for why they cannot receive financial assistance for the time it takes for them to settle down in Nigeria.

29. Nigeria has an education system which the appellant's children can access. It is accepted that English is widely spoken in Nigeria and therefore their lack of knowledge of Yourba will not undermine their ability to be educated. They can learn the language with the assistance of their parents. The evidence is that the children are doing very well at this country, which will help them to adapt the system of education in Nigeria. At these ages, they are not in any pivotal stage of their education. They have just reached the age of seven and nine and this is less significant to a child's than a child in their teenage years as stated in ***Azmi Moyed*** that the children's connections to the United Kingdom become more important from ages of 4 to 11. The children are young enough to adapt easily to life and education in Nigeria.

30. I have made a careful examination of all relevant information and factors in this appeal and come to a conclusion that it would not be unreasonable to expect the children to return to Nigeria with their parents and siblings as a family unit. I have taken into account the respondent's interest of the economic well-being of this country and that the continued residence of the appellant's family in this country would put a further burden on the public purse. I have considered the best interests of the children, notwithstanding the extra burden on the public purse.

31. I therefore find that there is a material error of law in the decision of the First-tier Tribunal and I set it aside. I substitute my decision and dismiss the appellant's appeal pursuant to Article 8 of the European Convention on Human Rights.

DECISION

The Secretary of State's appeal is allowed

I substitute my decision and dismiss the appellant's appeal

Signed by

Mrs S Chana
A Deputy Judge of the Upper Tribunal

Dated this 6th day of May 2017